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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

EQUITABLE TRUST COMPANY OF NEW YORK,
Plaintiff and Appellant,
vs.
WESTERN PACIFIC RAILWAY CO., et al.,
Defendants and Appellees.

BRIEF OF RECEIVERS ON MOTION TO DISMISS

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I.

THE VERY QUESTION INVOLVED IN THE APPEAL IS WHETHER OR NOT THE NEW YORK SUIT IS AN INTERFERENCE WITH MATTERS PROPERLY IN THE HANDS OF THE RECEIVERS. THEY ARE, THEREFORE, CERTAINLY INTERESTED IN THE QUESTION AND ARE CERTAINLY NECESSARY PARTIES TO THE APPEAL.

In *Davis* vs. *Mercantile Trust Company,* 152 U. S. 590, it is said:

> "One of the ordinary rules governing appeals is that all the parties to the record who appear to have any interest in the order or ruling filed must be given an opportunity to be heard on

such an appeal and that the failure to bring any such parties makes it necessary that the appeal be dismissed."

II.

IT IS THOROUGHLY WELL ESTABLISHED THAT THE RECEIVER IS TO BE CONSIDERED AS THE REPRESENTATIVE OF ALL PARTIES INTERESTED IN THE PROPERTY AND THAT AFTER HIS APPOINTMENT, NEITHER THE OWNER NOR ANY OTHER PERSON CAN LAWFULLY EXERCISE ANY AUTHORITY WHATSOEVER OVER THE PROPERTY.

Alderson on Receivers, Sec. 6, authorities cited;
Myer vs. *Western Car Company,* 102 U. S. 1.

In *Bosworth* vs. *Terminal Railroad,* 174 U. S. 182, it is said:

"A suit is brought to foreclose a mortgage, a receiver is appointed, and the mortgaged property taken possession of. A party intervenes, asserting that he has a claim against the mortgagor and the property, but conceding that it is subordinate to the claim of the plaintiff mortgagee. With that concession, the mortgagee stands perfectly indifferent to the question whether the claim be allowed or not. Still, it cannot be doubted that in such a case the receiver, holding the property against which a claim is made, can defend; and defend not only in the court appointing him, but also by appeal. In that defense he not only represents, it may be said, the mortgagor's interests, but also protects the property in his possession."

In *Thom* vs. *Pittard,* 62 Fed. 232, it is said:

"But first we have a motion to dismiss the appeal as improvidently awarded, made by the appellee; the reason assigned being that the receiver is in fact not a party to the suit, and therefore not entitled to an appeal. It is claimed that the receiver, the officers and servant of the court, subject to its orders, without personal interest in the funds under his control, which are to be accounted for as the court may direct, is not to be permitted to refuse to obey the court's orders by appealing from its decrees. But we must remember that the receiver represents all the parties in interest. He stands for the railroad company as well as for all persons having claims against it, and he speaks for the bondholders as well as for the stockholders. While he has no personal interest in the proceedings, except to faithfully and impartially discharge his duties, it is incumbent upon him to carefully protect the property confided to his keeping; to report to the court all matters connected therewith, relating to its safekeeping and proper disposition; to obtain permission to sue for debts due, and leave to pay claims owing by him. Permission given the receiver to sue, or direction to him to defend, should take with it the right to follow the suit to the court of last resort. It is a plausible argument that counsel for appellee submits, but it is, we think, without real merit. While it is true that any of the defendants to said chancery suit, interested in the property of the railroad company, and in its proper distribution, as also the plaintiffs, could have appealed from said decree in favor of appellee, proper steps therefor having been taken, still it does not follow that the receiver, who was in fact the defendant, so far as the issues raised by the petition were concerned, could not also appeal. In suits like the one in which this petition was filed,

after the appointment of a receiver, there is no one but him to defend the issues presented by such pleadings; and it is, at least, not best to have it understood that the court's directions to him to defend extend only to the court that hears the trial. But, so far as this proceeding is concerned, there is no difficulty, as the court below, whose officer the receiver was, gave him permission to prosecute still further the questions raised by the petition, when it approved his application for, and granted, this appeal. We consider the question settled in favor of the right of the receiver to appeal in cases like the one we now examine by the decision of the supreme court of the United States in *Farlow* v. *Kelley,* 108 U. S. 288, 2 Sup. Ct. 555, and 131 U. S., append. cci. It is insisted for the appellee that the right of the receiver, as an abstract question of law, to appeal, was not involved in that case. But it must be admitted that the supreme court held that in cases where an appeal had been granted the appellate court would entertain the same, and treat the order granting it as permission to appeal. While it is true, that under the provisions of section 692, Rev. St. U. S., it follows, of course, that an appeal will be granted if prayed for by one who has the right to it, still it is the duty of the trial court if the party asking for the appeal stands in such relation to the case that he can demand it. If he does not occupy such position the court can properly refuse the appeal. If the appeal is refused in a case where it properly lies, *mandamus* will issue. *Ex parte Jordan,* 94 U. S. 248."

In *McGregor* vs. *Third National Bank of Atlanta,* 53, Southeastern 94, Supreme Court of Georgia say:

"The receiver was, indeed an officer of court; but he was appointed for the express purpose of representing not only the defunct bank, but also

all of its creditors and stockholders. It was within the discretion of the court to permit its receiver to be sued. *Weslosky* v. *Quartermann,* 123 Ga. 312, 51 S. E. 426. When he was called on, by order of the court, to show cause why the prayers of the petition filed by the plaintiff bank should not be granted, he became a party defendant to the action, and it was his duty to defend it in behalf of all those of whom he was the duly appointed representative. Not only did he have a right to present his defense, but the very purpose of bringing him before the court as a party defendant was that he might urge any defensive matter to the suit which the creditors or other persons interested in the proper administration of the affairs of the defunct bank could urge, if themselves made parties defendant. Unless he represented them in the litigation, it would be necessary to bring all of them before the court; else any judgment rendered therein would not conclude or be binding upon them. It was through the receiver that these interested parties had to resist the granting of the relief sought by the plaintiff; and, the judgment being adverse to him, it was his right and duty, as their representative, to except thereto, if he or any of them was not satisfied therewith. Their right of review by the Supreme Court was certainly not cut off merely because he was an officer of court, and was, under ordinary circumstances, subject to its orders without question."

In *Southern Mutual Building & Loan Association* vs. *Andrews,* 26 Southern, 113, the Supreme Court of Alabama say:

"The plea avers, as we have seen, that the mortgage securing the debt owing by complainant is a part of the assets of the respondent in the hands of the receivers of its property, and that they alone have authority to collect any

amount due by complainant upon it. This being true, any decree involving an accounting by the court as to the amount due by complainant upon the mortgage debt would be *coram non judice* as to the receivers unless they were parties, and could not possibly accomplish the purpose for which the bill was filed. While it is true that in a court of law the legal title remained in the respondent, and was not divested of it by the decree appointing the receivers, yet it is nevertheless true that a decree adjudging the rights of complainant to redeem, as against the respondent solely, would not protect him against a foreclosure suit by the receivers, nor would the decree be *res adjudicata* of any issue which such suit would involve. Furthermore, so far as the mortgage is concerned in a court of equity the receivers are clothed with the equitable title to it, and possess sufficient fiduciary power to maintain a suit for its foreclosure. *Comer* v. *Bray*, 83 Ala. 217, 3 South. 554. The receivers having the equitable title to the mortgage and the sole authority to enforce it, the logical result is that they were necessary parties to the bill. *Southern Exp. Co.* v. *Western N. C. R. Co.*, 99 U. S. 191; Beach, Rec. Par. 716; High, Rec. Par. 258; *Kirkpatrick* v. *McElroy*, 41 N. J. Eq. 539, 7 Atl. 647. The plea was good, and the decree overruling it will be reversed, and the cause remanded. Reversed and remanded."

III.

THE SO-CALLED ORDER FOR INJUNCTION WAS MERELY A WARNING ORDER, AND THEREFORE NOT APPEALABLE.

The Court, by its order appointing the receivers, had already enjoined all persons from in any way interfering with the receivers. The order appealed

from, therefore, was nothing more than a proceeding to bring into contempt.

Ex parte Tyler, 149 U. S. 164.

IV.

In the affidavit of Alvin W. Krech, President of the Plaintiff, filed on the order to show cause, and made a part of the petition for prohibition, it is admitted that Contract "B" is a part of the mortgage. The language is: *"Contract B was specifically and separately mentioned in and is subject to the terms and provisions of said First Mortgage."*

Respectfully submitted,

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